

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of WINDSOR SQUARE DEVELOPMENT, INC., a corporation,

Bankrupt,

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation,

Bankrupt,

vs.

MARGARET B. BARRINGER; PHOENIX TITLE AND TRUST COMPANY, a corporation; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation; COUNTY OF MARICOPA; STATE OF ARIZONA; JOHN D. CALHOUN, COUNTY TREASURER OF THE COUNTY OF MARICOPA, STATE OF ARIZONA; MITT SIMS, TREASURER OF THE STATE OF ARIZONA; W. R. WELLS; RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE; GLEN E. WEAVER; E. R. FOUTZ; LUCILLE NICHOLS; NELLIE B. WILKINSON and SUSIE M. WALLACE, and THOMAS J. TUNNEY (Alleged Lien-Holders)

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No. 7765

MOTION TO STRIKE STATEMENT OF EVIDENCE FROM THE RECORD ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

FILED

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UL P. O'BRIEN,
CLERK

THOS. ARMSTRONG, JR.
R. WM. KRAMER
J. E. MORRISON
WALTER ROCHE
FRANK J. DUFFY,

*Attorneys for Central Arizona
Light and Power Company, a
corporation.*



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Comes now CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation, by its counsellors, Armstrong, Kramer, Morrison & Roche, and moves this Court to strike from the Transcript of Record in the above-entitled case the purported statement of evidence appearing therein, upon the following grounds:

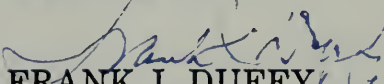
That the said purported statement of evidence was filed without any notice to this appellee, and that no notice of the hearings thereon was given this appellee, nor was this appellee given an opportunity to be present when said statement of evidence was settled and signed by the Judge of the United States District Court in and for the District of Arizona.


THOS. ARMSTRONG, JR.


R. WM. KRAMER


J. E. MORRISON


WALTER ROCHE


FRANK J. DUFFY, 17

Attorneys for Central Arizona Light and Power Company, a corporation.

UNITED STATES OF AMERICA
DISTRICT AND STATE OF ARIZONA } ss.
COUNTY OF MARICOPA

FRANK J. DUFFY, being first duly sworn, doth

depose and say: I am one of the attorneys for the Central Arizona Light and Power Company, a corporation. I have read the within Motion to Strike, in the above-entitled matter, and know the contents thereof; that the statements contained therein are true, according to the best of my knowledge, information and belief.

FRANK J. DUFFY

Subscribed and sworn to before me this ^{22nd} day of April, A. D. 1937.

R. E. Conger

R. E. CONGER

*Notary Public in and for
Maricopa County, Arizona*

(SEAL)

My commission expires
January 15, 1939.

STATEMENT OF FACTS RELATING TO MOTION
TO STRIKE STATEMENT OF EVIDENCE FROM
THE TRANSCRIPT OF RECORD IN THIS CASE.

On or about the 1st day of May, 1936, a purported statement of evidence was filed in the United States District Court by counsel for appellants. No notice of the lodging of said purported statement of evidence was given to this appellee, Central Arizona Light and Power Company, a corporation, nor was there any notice given of the date of hearing, which was set for May 18, 1936. On May 18, 1936, the date for hearing was continued to May 25, 1936, of which no notice was given, and thereafter the record is silent as to

what was done in regard to the settling of the statement of evidence until there appears in the record an entry that the evidence was settled by the Judge of the United States District Court on October 29, 1936. This appellee received no notice whatsoever of any of the foregoing proceedings, and was not present or represented by counsel at any of the times referred to.

BRIEF ON THE ARGUMENT

Rules 75 and 76 of the Equity Rules of the United States Federal Courts provide specifically the manner in which the appeal shall proceed with the settling of the evidence to be included in a record on appeal to a Federal Appellate Court. They provide that the testimony shall not be set out in full, but shall be stated in simple and condensed form. The duty of so condensing and stating the evidence shall rest primarily in the appellant, who shall prepare a statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing praecipe under paragraph (a) of Equity Rule 75. It is his duty also to notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice to the parties.

These rules have been interpreted in a number of cases, and where the appellant fails to prepare his bill of exceptions in the manner provided by said rules, the same will not be considered by the appellate court.

Metzler v. United States,
64 Fed. (2d) 203, 209.

The court in that case made no distinction between the rule as to settling statements of evidence in criminal and civil cases, because on page 209 it cites a number of civil cases where the appellant failed to follow the rule and the cases were dismissed.

See also:

Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corp.,
43 Fed. (2d) 355.

Hard & Rand, Inc. v. Biston Coffee Co.,
41 Fed. (2d) 625.

There the court held that because the statement of evidence was a verbatim report it did not constitute a bill of exceptions, and cited the rule, and as a result thereof affirmed the judgment of the lower court without considering the alleged statement of the evidence.

So, too, it has been held that failure to file proof of service on the appellees of the material parts of the record on appeal requires dismissal thereof.

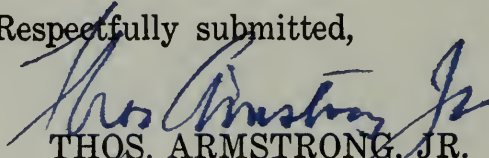
Wade, et. al, v. Leach,
2 Fed. (2d) 367.


Applying the rule of that case to the instant case, the failure of appellants to serve notice on this appellee of the various steps taken in settling the statement of evidence requires that the same be stricken from the record.

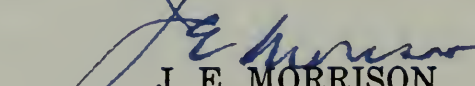
In the light of the record in this case, and the failure of the appellants to serve notice of the various steps in settling the evidence in this case on this ap-

pellee, after they had attempted to make this appellee a party to the appeal by serving citations upon it, we ask this Honorable Court to strike from the transcript of record in this case the statement of evidence prepared by appellants and settled without notice to this appellee.

Respectfully submitted,


THOS. ARMSTRONG, JR.


R. WM. KRAMER


J. E. MORRISON


WALTER ROCHE


FRANK J. DUFFY

*Attorneys for Central Arizona
Light and Power Company, a
corporation.*